

COPY

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

CITY OF ROCK ISLAND, ILLINOIS,)
a municipal corporation,)
Petitioners,)
v.)
THE BURLINGTON NORTHERN AND SANTA FE)
RAILWAY COMPANY A/K/A BURLINGTON)
NORTHERN RAILROAD COMPANY,)
Respondent.)

No. T 02-0114

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Illinois Commerce Commission
RAIL SAFETY SECTION

**RESPONDENT, THE BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY'S REPLY TO RESPONSE TO
RESPONDENT'S MOTION TO DISMISS**

Now comes respondent, The Burlington Northern and Santa Fe Railway Company ("BNSF"), by its attorneys, Kenneth J. Wysoglad & Associates and for its reply to petition's response to respondent's motion to dismiss states as follows:

UNVERIFIED PETITION

- A. Respondent, BNSF moved to strike the petition of the City of Rock Island, Illinois as the same was not properly verified in accordance with § 200.130 of the Illinois Commerce Commission Rules of Practice, 83 Illinois Administrative Code § 200.130. Petitioner improperly attempts to cure this defect by tendering a verification signed by its attorney. 83 Illinois Administrative Code § 200.130 specifically provides that a petition must be verified by the party. As the verification of petitioner's attorney is inadequate under the Rules of Practice of the Illinois Commerce Commission, the petition of the City of Rock Island, Illinois should be stricken.

DOCKETED

**THE PETITION SHOULD BE DISMISSED FOR
LACK OF SUBJECT MATTER JURISDICTION**

1. Respondent, BNSF filed its Motion to Dismiss petitioner's petition for installation of a pedestrian at grade crossing on the grounds that the Illinois Commerce Commission lacks jurisdiction to enter any such order.
2. In response to BNSF's motion, petitioner argues, citing to certain case authority, that the Illinois Commerce Commission's jurisdiction over all phases of grade crossing regulation is plenary and exclusive. Petitioner implies in its argument that such jurisdiction would extend to pedestrian at grade crossings. Petitioner's contention is of course, erroneous.
3. Respondent, BNSF agrees that the Illinois Commerce Commission's jurisdiction over railroads is exclusive to the extent that it preempts railroad regulation by any other State administrative agency or political subdivision of the State of Illinois. See: McClaghry v. Village of Antioch, 695 N.E.2d 492 (2nd Dist. 1998). Additionally, respondent, BNSF agrees that the Illinois Commerce Commission has exclusive jurisdiction to regulate public safety at the crossings of public roadways and the tracks of a rail carrier, either at grade or separated grade. City of Chicago v. Illinois Commerce Commission 402 N.E.2d 595 (1980).
4. The issue raised in respondent's motion to dismiss and the issue completely avoided in petitioner's response is what constitutes a "grade crossing" over which the Illinois Commerce Commission can assert jurisdiction. As clearly

set forth in respondent's motion, the Illinois Commerce Commission's jurisdiction extends only to grade crossings created by the intersection of public roadways and the tracks of a rail carrier. It is beyond argument that the Illinois Commerce Commission derives its power and authority fully from the statute creating it and is without power to extend its jurisdiction as that is within the sole prerogative of the Illinois legislature. Regional Transp. Authority v. Ill. Comm Com'n., 118 Ill. App. 3d 685, 455 N.E.2d 172 (1st Dist. 1983). The Illinois Commerce Commission cannot, by its own acts, extend its jurisdiction. City of Peoria v. Illinois Commerce Commission, 477 N.E.2d 749 (Ill. App. 3d Dist. 1985). The Illinois Commerce Commission has no inherent or common law powers, but is empowered to act only according to authority properly conferred upon it by law. Moncada v. Illinois Commerce Commission, 518 N.E.2d 349 (1st Dist. 1987).

5. In this case, a plain reading of the relevant statute establishes that the Illinois legislature has circumscribed the jurisdiction of the Illinois Commerce Commission to only public roadway at grade crossings. 625 ILCS 18c - 7401 provides in relevant part:

"No public road, highway or street shall hereinafter be constructed across the tracks of any rail carrier at grade...without having first secured the permission of the Commission..."

6. Even the authority cited by petitioner demonstrates that the Illinois legislature has restricted the jurisdiction of the Illinois Commerce Commission with respect to its authority over at grade crossings. In McClaughry, *supra*, the

Second District Appellate Court observed that the Illinois Commerce Commission could excuse a rail carrier from the sounding of its whistle/horn at an at grade crossing but the relevant statute did not grant the Illinois Commerce Commission authority to prohibit the sounding of the train whistle/horn. McClaghry, 695 N.E.2d at 497.

7. Similarly, petitioner's reference to that provision of 625 ILCS 5/18c-7401 (3) referencing construction of pedestrian bridges or subways across the track of any rail carrier further supports respondent's motion to dismiss for lack of subject matter jurisdiction. The aforereferenced statutory provision was added to the Illinois Commercial Transportation Law by statutory amendment in June, 2000. The addition of this statutory amendment into the Illinois Commercial Transportation Law is a specific acknowledgment that prior to the addition of the amendatory language the Illinois Commerce Commission had no jurisdiction whatsoever with respect to any form of pedestrian crossing. However, with the statutory amendment the Illinois legislature granted the Illinois Commerce Commission jurisdiction only with respect to the construction of pedestrian bridges carrying the pedestrian walkway over the tracks of a rail carrier and pedestrian subways carrying the pedestrian walkway beneath the tracks of a rail carrier. The Illinois legislature specifically excluded from Illinois Commerce Commission jurisdiction pedestrian at grade crossing.

8. As fully demonstrated in respondent's motion, the Illinois Commerce Commission does not have authority to compel or otherwise authorize construction of a pedestrian at grade crossing.


Wherefore, based on all of the foregoing, respondent, The Burlington Northern and Santa Fe Railway Company prays that the Illinois Commerce Commission enter an order dismissing the petition of the City of Rock Island, Illinois for lack of subject matter jurisdiction.

**MOTION TO DISMISS COUNT II OF THE
PETITION FOR INSUFFICIENCY OF PLEADING**

1. In responding to BNSF's motion to dismiss Count II of the petition for insufficiency of pleading, petitioner is relegated to observing that respondent cited no law in support of its motion. Implicit in petitioner's response, is that the Illinois Commerce Commission should ignore and reject Illinois' long standing fact pleading practice and instead rule that BNSF and the Illinois Commerce Commission are not entitled to a plain statement of facts sufficient to inform respondent and the Illinois Commerce Commission of the basis supporting petitioner's request for relief. Petitioner's "the less said the better" form of pleading, makes it virtually impossible for respondent and the Illinois Commerce Commission to adequately prepare for public hearing or evaluate the propriety or need for petitioner's requested relief. The position passively adopted by petitioner herein should be rejected by the Illinois Commerce Commission.

Wherefore, respondent, The Burlington Northern and Santa Fe Railway Company prays that the Illinois Commerce Commission strike Count II of petitioner's petition for insufficiency of pleading.

KENNETH J. WYSOGLAD & ASSOCIATES



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PROOF OF SERVICE

Michael L. Sazdanoff, being first duly sworn on oath, deposes and says that on the 14th day of JANUARY, 2003, he caused to be served, a true and correct copy of **RESPONDENT, THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY'S REPLY TO RESPONSE TO RESPONDENT'S MOTION TO DISMISS** upon:

Mr. Phillip E. Koenig
Konecky, Koenig, Kutsunis and Weng
1515 Fourth Avenue, Suite 301
Rock Island, Illinois 61201

Mr. Henry Humphries
Illinois Commerce Commission
527 E. Capitol Avenue
Springfield, Illinois 62701

by depositing same in the U.S. Mail depository located at Adams and Clinton Streets, Chicago, Illinois in an envelope(s) with first-class postage, prepaid.

